

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Federal-State Joint Board on
Universal Service

Western Wireless Corporation
Petition for Preemption of an
Order of the South Dakota
Public Utilities Commission

DOCKET FILE COPY ORIGINAL

CC Docket No. 96-45

**REPLY TO OPPOSITION
OF PROJECT TELEPHONE COMPANY AND RANGE TELEPHONE COOPERATIVE**

Project Telephone Company ("Project") and Range Telephone Cooperative ("Range"), by their attorney, file their Reply to the Western Wireless Corporation's Opposition to their Petition for Reconsideration of the Commission's Declaratory Ruling ("Ruling") released August 10, 2000, FCC 00-248.

I. INTRODUCTION

Western Wireless asked the Commission to preempt a South Dakota Public Utilities Commission (SDPUC) ruling that rejected, following an evidentiary hearing, its application for designation as an Eligible Telecommunications Carrier (ETC). The SDPUC concluded, *inter alia*, that "an ETC must be actually *offering or* providing the [supported] services before being designated as an ETC, and that Western Wireless was not currently offering the services.¹ The Ruling did not preempt the SDPUC Order, an appeal of which is pending before the state

¹ Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, *Findings of Fact and Conclusions of Law; Notice of Entry of Order*, S.D. P.U.C. Conclusions of Law 6 & 7. (Emphasis added).

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Supreme Court. Instead, the Ruling declared that a hypothetical state requirement that a “ new entrant *provide* service throughout a service area prior to designation as an ETC has the effect of prohibiting the ability of a new entrant to provide ...telecommunications service in violation of section 253(a).”² The Ruling also concluded that such a state requirement would be inconsistent with Section 214(e) and the objectives of Section 254.³

Project and Range seek reconsideration of the Ruling primarily because it concludes, without any basis in fact, that the hypothetical requirement violates the “effect of prohibiting” clause of section 253(a). This conclusion establishes a precedent which will be relied on by the Commission, other states and courts as if it were based upon an expert agency’s analysis of relevant facts when that was not the case. The Ruling neither makes reference to the actual facts in the South Dakota case, nor hypothecates an assumed set of facts.⁴

Western Wireless focuses its Opposition to the Petition on the Ruling’s statutory interpretation of Section 214(e), while relegating the principal concerns of Project and Range regarding the Section 253 conclusion to an “ancillary argument.” Assuming, *arguendo*, the Commission’s analysis of Section 214(e) is correct, as Western Wireless asserts, it could have

² Ruling at para. 10. The Ruling addresses a hypothetical requirement to *provide* service, however the SDPUC required that Western Wireless *offer or provide* the supported services. The difference is significant, especially in light of Western Wireless’ contention that it stands ready to fill any gaps in coverage upon demand.

³ Id. at para 28.

⁴ The Ruling makes no reference to any other state having issued, or planning to issue, such a ruling. If there is no actual state ruling which is creating uncertainty, then there is no basis for issuing a declaratory ruling. If the SDPUC decision is the cause of the uncertainty, then the declaratory ruling must relate to the facts and circumstances which create the uncertainty.

simply announced it would preempt any contrary state interpretation without ever reaching the Section 253 issue. Instead, it took the unexplained and illogical approach of first deciding the factual intensive “effect of prohibiting” issue, while declining to address the facts (or lack thereof) on the record, then decided the legal issue of statutory interpretation. While the Commission undoubtedly has great discretion in determining how to proceed, if this procedure does not rise to an abuse of discretion, it certainly highlights the weakness of its logic.

II. THE RULING’S CONCLUSIONS UNDER SECTION 253 WERE MADE WITHOUT ANY BASIS IN FACT OR THE RECORD

Project and Range pointed out in their Petition that the Ruling cites no facts, of record or otherwise, for its conclusion that requiring prior provision of service before ETC designation has the effect of prohibiting entry, despite the clear precedent of the Commission’s earlier decisions that credible and probative evidence of *material* effect must be demonstrated.⁵ Western Wireless responds that the Commission can somehow discern the evidence from the Act, its own policies, and basic economic principles.⁶

Nowhere in the four corners of the English language or legal precedent can be found any support for the proposition that statutes, policies and principles are evidence of anything other than themselves. Evidence consists of facts or indicia of facts which logically tend to prove or

⁵ Project and Range at 11-12; SDITC at 10-11 and cases cited therein. Western Wireless asserts at 9 that because the Commission did not issue a preemption order, but only ruled on whether a particular interpretation would violate section 253, it need not follow its own section 253 precedents. This argument is astonishing, on its face, and is an apparent concession that the Ruling is, in fact, inconsistent with the Commission’s precedents.

⁶ Western Wireless, App. A at 5-6.

disprove a proposition or fact in dispute.⁷ Whether or not in a particular case, or in all cases, the lack of prior ETC designation has the effect of preventing a carrier from entering a market cannot be shown by statute, regulatory policies or economic principles, but only by the actual economic and market facts of the situation. For this reason the Commission's guidelines for Section 253 petitions based on "effect of prohibiting" state: "Petitioner should describe with particularity how the challenged...legal requirement has such an effect."⁸ If the Commission can reach "effect" conclusions with only an implied assumption that the "effect" is caused by the state requirement, it should rescind its guideline.

Western Wireless asserts its costs are irrelevant to an "effect" determination,⁹ but simultaneously argues that it can not compete without knowing in advance of investment that it will get support. That factual assertion is not self evident, but must be proven before the Commission can conclude there is a barrier to entry. For example, if the cost of service to the incumbent, net of support, is \$50 per subscriber and the new entrant's cost without support is \$20 there is no barrier to entry and all the laws, policies and principles become irrelevant to a Section 253 analysis.¹⁰ On the other hand, if the numbers are reversed, a barrier might be found, but it is not apparent that there are any other effects of lack of prior designation.

⁷ See, Jerome Prince, Richardson on Evidence, Eighth Edition, p. 2-3 (1955)

⁸ *Suggested Guidelines For Petitions For Ruling Under Section 253 of the Communications Act*, Public Notice, FCC 98-295, OMB Approval 3060-0895, Released Nov. 17, 1998, 3.

⁹ Western Wireless, App. A at 2.

¹⁰ Petition at 8-9. Of course, a statute might create an non-rebuttable presumption, but Section 253(a) does not.

Western Wireless asserts that even if the new carrier could provide substitutable service at a cost below that of the supported incumbent, there is still a disincentive for a new carrier to enter. The disincentive allegedly occurs because the new entrant will have more need to maintain efficiency than the incumbent.¹¹ Even if, *arguendo*, there is such a disincentive, it is not self evident that the disincentive rises to the level of materiality which the Commission's precedents require. The Commission has repeatedly refused to preempt in situations where the disincentives were found not to rise to the level of a barrier to entry.¹²

Western Wireless then asserts that "subsidizing one carrier but not another files in the face of the principles of open competition and competitive neutrality that are central to universal service policy."¹³ Even if this statement is accepted as true, it is not relevant to the question of whether requiring a carrier to actually provide (or offer) service before designation is a barrier to entry.

The statement is not true, however and furthermore Western Wireless does not really want competitive neutrality, but a competitive advantage. Universal Service support is paid to an incumbent only after its costs are determined by application of highly complex rules specified in

¹¹ Western Wireless, App. A at 2. If a carrier's underlying costs are lower because of use of a different technology, maintenance of that differential is not tied to the "efficiency" of the operation.

¹² See, e.g., California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California, *Memorandum Opinion and Order*, 12 FCC Rcd 14191, 14209. (Even if indoor payphones generate less revenue than outdoor does not necessarily mean indoor payphones are uneconomic, record would have to demonstrate they would generate so little revenue as to effectively prohibit the ability to provide service.)

¹³ Western Wireless, App. A at 2.

Parts 32,36, 64 and 69. Its books are subject to audit by the Commission, the state, NECA, USAC and often RUS and the results are public information. In every instance the amount of support received is merely a component of recovery of its revenue requirement. The support, plus its other regulated revenues equal up to 100% of its costs, but not a penny more.

Western Wireless however seeks to obtain the per line support of the incumbent which has no relation whatever to its costs, which it keeps secret. The pejorative term “subsidy” is an accurate description of any support it receives, but is not an accurate description of support received by the incumbent. The purpose of support is to ensure that service is available at comparable rates everywhere in the country. A competitively neutral support system would provide support on the basis of a carrier’s need, not its competitor’s need.

In short, where costs are similar, the need for support will be similar and a new entrant may not make substantial investment without some assurance that it will also receive support. But there is no information whatsoever in the record of this proceeding that costs are similar or that substantial investment is required for Western Wireless.¹⁴ To the contrary, the evidence which Western Wireless put before the SDPUC tended to show that very little investment would be needed because its existing infrastructure would be used.

By purporting to address a hypothetical requirement thinly disguised as the SDPUC Order, the Ruling creates a black and white world, where the real world has significant shades of

¹⁴ The fact cited in the Petition that there is no support for 70% of the lines in the state is relevant to the question of whether support is needed to serve the whole state. It is not clear what the relevance of CALLS support for access charges is to a carrier without access charges.

grey which Congress intended state commissions to consider in acting upon ETC applications. The Ruling thus makes no direct reference to the SDPUC's alternative finding, based on an evidentiary hearing, that Western Wireless' support of its application was so lacking in specifics and credibility that the SDPUC could not accept its statement of intention as *bona fide*.¹⁵ The Ruling does state, however:

...a demonstration of the capability and commitment to provide service must encompass something more than a vague assertion of intent on the part of a carrier to provide service. The carrier must reasonably demonstrate to the state commission its ability and willingness to provide service upon designation.¹⁶

A fair reading of the SDPUC Decision is that Western Wireless failed to make the required demonstration. The lack of credibility of its presentation was compounded by the confusion it introduced by simultaneously asserting, but failing to prove, that its existing mobile services met the definition of supported services, but that it wanted ETC designation for some other service. The existence of "gaps" in Western Wireless' coverage in South Dakota was highly relevant to its credibility. Western Wireless asserts that so long as a carrier demonstrates a commitment and ability to extend service expediently upon request, gaps in coverage cannot be held against it.¹⁷ The transcript of the hearing and the findings of the SDPUC support its conclusion that Western Wireless failed to demonstrate its commitment and ability.

¹⁵ SDPUC Decision at 4, para. 22.

¹⁶ Ruling at para. 24.

¹⁷ Western Wireless App. A at 1.

III. The Ruling's Interpretation of Section 214(e) Was Made Without Analysis of its Plain Meaning or the Context in Which it is Applied in a State

Project and Range explained in their Petition how the plain meaning of Section 214(e) is consistent with a requirement that service must be offered or provided prior to designation and noted that the ruling failed to discuss the contentions on the record that the statute establishes a present requirement to offer the supported services.¹⁸ Western Wireless asserts to the contrary that the Ruling was a correct interpretation and that the *whole* of the Ruling rejects the present tense conclusion.¹⁹ It does not, and cannot, however, point to any actual analysis of the words of the statute. It is true that the Ruling is inconsistent with a present tense interpretation, but the *gestalt* argument only serves to highlight the Ruling's total failure to even acknowledge the plain words of the statute.

Like the Ruling, the Opposition totally fails to come to grips with the actual words of the statute, which are necessarily the first step in interpretation. The implication of this failure is that neither can explain how the words of the statute support the conclusions that they desire. The Opposition, like the Ruling, relies entirely on allegations of Congressional intent and harmony with Section 254, but those considerations are entirely improper if the meaning of the statute is plain on its face. If the meaning of Section 214(e) was as stated in the Ruling, the entire Section 253 analysis would be totally unnecessary.

¹⁸ Petition at 12-14.

¹⁹ Western Wireless at 3-6; n.10.

IV. CONCLUSION

The Commission has established an extensive body of precedent interpreting the Section 253 prohibition on barriers to entry. In each case, and in its guidelines for requests to enforce that Section, the Commission has placed the burden on the proponent to come forward with probative evidence that a state requirement actually has the "effect" of prohibiting entry. The Declaratory Ruling adopted by the Commission in response to Western Wireless's Petition totally disregards that precedent without explanation and assumes without citation to actual facts or explicit assumption of facts, that a hypothetical state requirement has the effect of prohibiting entry. The Ruling also interprets Section 214(e) based entirely on its assumed purpose and intent, with total disregard for its plain language. For these and the other reasons discussed in the Petitions for Reconsideration, the Ruling must be vacated.

Respectfully submitted,

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Certificate of Service

I, Nancy Wilbourn, of Kraskin, Lesse, & Cosson, LLP, 2120 L Street, Suite 520, Washington, DC 20037, hereby certify that a copy of the foregoing "Reply to Opposition of Project Telephone and Range Telephone Cooperative", was served this 28th day of September, 2000, by first class, U.S. Mail, postage prepaid to the following parties:


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